

Supreme Court, U. S.  
**FILED**

**OCT 29 1976**

MICHAEL RODAK, JR., CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1975

No. 75-1875

WADE H. LITRELL,  
Petitioner,

VS.

UNITED STATES OF AMERICA,  
Respondent.

**PETITION FOR REHEARING FOR  
PETITION FOR A WRIT OF CERTIORARI**

**To the United States Court of Appeals  
for the Eighth Circuit**

EDWARD R. JOYCE  
1108 Olive, 3rd Floor  
St. Louis, Missouri 63101  
(314) 241-2308  
Attorney for Petitioner

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**STATEMENT**

Your Petitioner states that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was denied on October 4, 1976 and that for the purpose of this Petition for Rehearing there is incorporated by reference the Jurisdictional Statement and the Statement of the Case in the previously denied Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

## QUESTIONS PRESENTED FOR RECONSIDERATION

### Count I

1) Whether the Court Erred in Denying Appellant's Motion for a Directed Verdict on Count I on the Basis That the Uncontradicted Evidence Showed That Appellant Did Not in Fact Make a Return to the Internal Revenue Service of His 1969 Income, Therefore, Could Not Have Violated Title 26 U.S.C. § 7206(1).

The Petitioner's position is that through inadvertance he did not mail his executed Form 1040 for 1969 to the Internal Revenue Service and being unaware of this fact until his trial could not and did not authorize anyone to act on his behalf.

The preparer of the Form 1040 Herbert Graham CPA testified that his files relating to Petitioner contained a filing instruction document which bore the notation and initials of his secretary which indicated that she had mailed the Form 1040 for 1969 to Internal Revenue Service. Mr. Graham testified that it is not the custom or practice of certified public accountants to file returns for their clients due to the potential liability involved.

The whole case of the Government is that Special Agent Glen Noeltner testified that Petitioner told him in 1971 that he, the Petitioner, had mailed the Form 1040 from St. Louis, Missouri to the Internal Revenue Service Center. When Special Agent Glen Noeltner so testified he knew or should have known that the statement allegedly made by Petitioner was incorrect for it was learned after the trial that Special Agent Noeltner had photocopied the file of Mr. Graham relating to Petitioner in 1971 and that the file contained the instruction for filing document which bore the notation of the secretary of Mr. Graham to the effect that she had mailed the Form 1040 on June 15, 1970.

The document in question was submitted to the United States Court of Appeals for the Eighth Circuit after oral argument.

In summary, it is suggested that the Petitioner did not make a return of his 1969 income to the Internal Revenue Service in 1970 and being unaware of such fact did not authorize or ratify the mailing of the Form 1040 to the Internal Revenue Service by the secretary of Mr. Graham and thus an essential element necessary to constitute a violation of Title 26 U.S.C. Section 7206 (1) was missing.

2) Whether the Court Erred in Denying Appellant's Motion for a Directed Verdict on Count I in That of the Amounts Received From the Corporations Which Were the Source of Appellant's Alleged Commissions, Payments Were Made Which Were Described in the Testimony of Internal Revenue Agent Hal Jackson as Payments Made to Employees of Said Corporations for Corporate Purposes and for Corporate Expenses and That Such Payments Exceeded in Amount the Alleged Omitted Commissions From Said Corporations.

The Government's whole case is that Petitioner received \$117,500.00 from three corporations in 1969 which he allegedly termed "Commissions" but only reported \$60,000.00 on Schedule "C" of the Form 1040 for 1969. The Petitioner testified and introduced in evidence documentary evidence that of the above described funds received from the corporations, he at the direction of the President of the corporations, used in excess of \$60,000.00 of such funds to pay corporate expenses. The Government's witness Internal Revenue Agent Hal Jackson testified that the Petitioner had in fact used in excess of \$60,000.00 of such funds to pay corporate expenses. Irrespective of whether the funds were or are described by Petitioner or the Government as commissions, gross income or receipts, the substance of the transaction controls, not the form the transaction is cast in or termed.

In the absence of any evidence that the use of the funds to pay corporate expenses were in the nature of loans to the corporations or capital contributions to the corporations, there was no evidence on which the jury could validly conclude that the funds in their entirety were income to the Petitioner.

### **Count II**

1) Whether it Was Plain Error to Conclude that the Subscribing to Internal Revenue Service Form 433-AB Constituted a Violation of Title 26 U.S.C. Section 7206 (1).

This issue is raised for the first time in this Petition. Petitioner requests the Court to consider under Rule 52 of the Federal Rules of Criminal Procedure whether the conviction of Petitioner for a violation of Title 26 U.S.C. Section 7206 (1) on basis of the Petitioner subscribing to Internal Revenue Service Form 433-AB was plain error for the reason that the Internal Revenue Officer did not have the authority to require Petitioner to respond to said Form 433-AB and that said Form 433-AB was not a document or statement required by the Internal Revenue Code or by any regulation lawfully promulgated for enforcement of the Code. *United States v. Levy*, 533 F 2nd 969.

### **CONCLUSION**

Wherefore, Petitioner prays that the Supreme Court of the United States grant his heretofore filed Petition for a Writ of Certiorari and review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

**EDWARD R. JOYCE**

1108 Olive Street, 3rd Floor

St. Louis, Missouri 63101

(314) 241-2308

Attorney for Petitioner

### **Certification**

I certify that this Petition for Rehearing is presented in good faith and not for delay.

Edward R. Joyce

Attorney for Petitioner